



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Revise)
and Clarify Commission Regulations Relating)
to the Safety of Electric Utility and)
Communications Infrastructure Provider Facilities)
_____)

R.08-11-005
(Filed November 6, 2008)

**COXCOM, INC. AND COX CALIFORNIA TELCOM LLC (U-5684-C)
RESPONSE TO MOTION TO MODIFY ASSIGNED COMMISSIONER'S RULING
AND SCOPING MEMO FOR PHASE 2**

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December 21, 2009

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Pursuant to Rule 11.1 of the Commission’s Rules of Practice and Procedure, CoxCom, Inc. and Cox California Telcom, L.L.C. (U-5684-C) (“Cox”) hereby respond to the December 4, 2009 “Motion to Modify Issue 20 Set Forth in the Assigned Commissioner’s Ruling and Scoping Memo For Phase 2 and to Clarify Applicability of Ex Parte Rules” filed by AT&T California and AT&T Mobility LLC (“AT&T”) on behalf of itself, Southern California Edison Company, Cellco Partnership LLP d/b/a Verizon Wireless, Sprint Nextel, and NextG Networks of California, Inc. (“AT&T Motion”).

The AT&T Motion requests that the Scoping Memo for Phase 2 of this proceeding be revised to limit the issues set forth in Issue 20¹ to potential prospective changes to pole loading rules and to exclude any pole loading issues that are also currently pending before the

¹ Issue 20 is described as follows in the Scoping Memo for Phase 2: “20. Loading Standards. The scope of Phase 2 includes (i) what is the proper interpretation of the pole loading standards in GO 95, including (a) the safety factors in Rule 44 and (b) the design, construction, and performance requirements in the first paragraph of Rule 48; (ii) what constitutes overloading; (iii) identifying the party responsible for determining how strong the pole is at the time an attachment is requested; and (iv) how long to retain information regarding facilities added to a pole and related pole loading calculations or exemptions; and (v) whether it would be useful to add a third loading condition to Rule 43, to be entitled “Loading Conditions for Fire Prone Areas.” These conditions would encompass those encountered in fire prone areas such as dry vegetation, high temperatures, strong winds, etc. The actual conditions will be specified, discussed, and vetted in the workshops.” Scoping Memo, mimeo at 7.

Commission in I.09-01-018, the Malibu Fire OII.² The AT&T Motion also requests that the Commission consider deferring consideration of pole loading issues in this rulemaking proceeding until after a final decision is issued by the Commission in the Malibu Fire OII.³ And finally, the AT&T Motion requests that the Commission impose a ban in Phase 2 of this rulemaking prohibiting any ex parte communications concerning pole loading issues and “any other issues that are now before the Commission in I.09-01-018.”⁴ For the reasons discussed below, Cox supports the request to modify the Scoping Memo, but opposes the request to defer consideration of pole loading issues and to impose a ban on certain ex parte communications in this proceeding.

In its Order Instituting Rulemaking (“OIR”) in this proceeding,⁵ the Commission specifically stated that the Commission would not consider in this proceeding issues pending before the Commission in the separate investigations regarding the recent fires in Southern California.⁶ This is entirely appropriate since the administrative process and burden of proof are entirely different in rulemaking and enforcement proceedings. Rulemakings tend to be prospective in focus whereas enforcement proceedings tend to be retrospective in nature and rulemakings tend to have an industry wide focus whereas enforcement proceedings are concerned with the particular acts or omissions of the specific respondent or respondents that are alleged to have violated existing requirements. Issue 20 set forth in the Scoping Memo for Phase 2 of this proceeding appears to conflict with the purpose and scope of this proceeding as

² AT&T Motion at 3-6.

³ AT&T Motion at 5.

⁴ AT&T Motion at 7-8.

⁵ Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric utility and Communications Infrastructure Provider Facilities, R.08-11-005 (November 6, 2008).

⁶ The OIR states, “The Commission and its CPSD staff have pending investigations into whether existing Commission regulations or statutory provisions may have been violated with regard to certain of the Southern California fires. Those issues will not be litigated in this OIR.” OIR, mimeo at 4.

articulated in the OIR since it appears to encompass several retrospective issues that are pending in the Malibu OII, specifically, “what is the proper interpretation of the pole loading standards in GO 95”⁷ and “what constitutes overloading.”⁸ Cox agrees that it is inappropriate for the Commission to consider issues in this rulemaking that are also pending before the Commission in the Malibu OII. As a result, the AT&T Motion should be granted to the extent that it requests modification of the Scoping Memo to limit the issues in this proceeding to prospective changes to existing rules pertaining to pole loading and to eliminate from consideration any issues regarding interpretation of existing pole loading rules that have been raised in the Malibu OII.

Cox opposes, however, the proposal to defer consideration in this rulemaking of prospective changes to pole loading issues that are not at issue in the Malibu OII. Prospective Proposed Rule Changes (“PRCs”) to existing pole loading rules have been proposed for consideration in Phase 2 of this proceeding by a number of parties, including the Communications Infrastructure Provider Coalition (“CIP Coalition”), the Commission's Consumer Protection and Safety Division (“CPSD”) and the joint electric utilities. Several of these PRCs have the potential to enhance communication and coordination between parties with facilities on joint use poles and to facilitate the more prompt resolution of disputes regarding pole loading.⁹ If consideration of these PRCs is deferred until after a final decision is issued in the Malibu OII, potentially beneficial changes to existing pole loading rules could not be

⁷ Scoping Memo, mimeo at 7.

⁸ Scoping Memo, mimeo at 7.

⁹ *See, for example*, the CIP Coalition PRC to General Order 95, Rule 44.2 which would require fuller disclosure of data, assumptions and other pertinent information for resolving pole loading disputes and would facilitate expedited resolution of such disputes. CIP Coalition Proposed Rule Changes for Consideration in Phase 2 (December 16, 2009).

considered or adopted by the Commission for at least another year, since a final decision is not scheduled to be issued in the Malibu OII until December 2010.¹⁰

There are no good grounds for deferring consideration of these PRCs for such a prolonged period of time. To the best of Cox' knowledge, the PRCs proposed for consideration in this proceeding entail prospective changes to existing pole loading rules that do not involve any issues regarding past compliance currently before the Commission in the Malibu OII. As a result, the PRCs proposed in this proceeding regarding pole loading rules can be considered by the Commission without impairing the rights of the parties to the Malibu OII. Under these circumstances, the request to defer consideration of PRCs regarding pole loading issues should be denied.

Cox also opposes the proposed ban on certain ex parte communications in this proceeding. As proposed in the AT&T Motion, the ex parte ban would be overly broad and would unnecessarily infringe on the well-established rights of parties to this rulemaking.

Under Commission rules, ex parte communications are permitted in quasi-legislative proceedings, such as this rulemaking proceeding, without limitation.¹¹ The AT&T Motion would alter this well-established and long-standing policy and practice to the detriment of all parties, including many parties that are actively participating in this rulemaking and are not involved in any way in the Malibu OII. The AT&T Motion seeks to impose a blanket ban applicable to all parties in the rulemaking regarding pole loading issues and certain "other issues." The Motion seeks to do so on grounds that the parties to the Malibu OII may be disadvantaged if they are prohibited from any ex parte communications in this rulemaking on issues that may be perceived to be "linked" in some sense to issues in the Malibu OII.

¹⁰ The proposed schedule in the Malibu OII currently contemplates issuance of a final decision by the Commission on December 10, 2010. *See* I.09-01-018, Assigned Commissioner's Ruling and Scoping Memo (October 22, 2009).

¹¹ *See* Rule 8.2(a) of the Commission's Rules of Practice and Procedure.

The AT&T Motion fails, however, to identify any such “other issues.” It identifies with specificity only the two pole loading issues described in Issue 20 in the Scoping Memo for Phase 2 discussed above. As a result, the scope of the ex parte ban proposed in the AT&T Motion is not at all clear. In the absence of further clarification regarding the precise issues to which it would apply, parties to this rulemaking that are not also parties to the Malibu OII would have no effective means of knowing on what topics ex parte communications in the rulemaking would be permitted and on what topics they would be prohibited. The ex parte ban as proposed in the AT&T Motion would thus be completely unworkable.

In addition, if Issue 20 is modified as requested in the AT&T Motion, this would effectively eliminate any overlapping subject matter from the two proceedings and would also eliminate the risk that ex parte communications regarding issues in the OIR, as modified, could be construed as a violation of ex parte rules applicable to the Malibu OII. Should there be any doubt in this regard, however, the Commission could eliminate such doubt by clarifying in its ruling on the AT&T Motion, both in this proceeding and in the Malibu OII, that ex parte communications regarding issues in the OIR, as modified, including pole loading issues, will not constitute a violation of ex parte restrictions applicable to the Malibu OII. Such a clarification would put AT&T and other parties to the Malibu OII on a clear and equal footing with all other parties in Phase 2 of this proceeding and would provide a means for facilitating a full and complete exploration of issues in this rulemaking proceeding in the manner to which the Commission and the parties have long been accustomed in similar rulemaking proceedings.

For the reasons set forth herein, Cox urges the Commission to grant the request to modify Issue 20, deny the request to defer consideration of pole loading issues and deny the request for a ban on ex parte communications in this proceeding regarding pole loading and “other issues.”

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robin Huey, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, CA 94111.

On December 21, 2009, I caused the following to be served:

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via electronic mail to all parties on the service list R.08-11-005 who have provided the Commission with an electronic mail address and by First class mail on the parties listed as "Parties" and "State Service" on the attached service list who have not provided an electronic mail address.

/s/Robin Huey

Robin Huey

VIA EMAIL AND US MAIL

Commissioner Timothy A. Simon
Administrative Law Judge Timothy Kenney
Administrative Law Judge Angela Minkin
Administrative Law Judge Jean Vieth



CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

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